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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR ALEJANDRO ISLASMACIAS,

Defendant and Appellant.

D053593

(Super. Ct. No. SCD210761)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed.

INTRODUCTION

A jury convicted Hector Alejandro Islasmacias of two counts of committing a lewd act on a minor. (Pen. Code, § 288, subd. (a).)¹ The jury also found as to one of the counts that Islasmacias had substantial sexual conduct with a child under 14 years of age. (§ 1203.066, subd. (a)(8).) The trial court sentenced Islasmacias to three years in prison.

¹ Further statutory references are to the Penal Code unless otherwise specified.

Islasmacias appeals, arguing the trial court violated his federal due process rights by: (1) failing to sua sponte instruct the jury on a mistake of fact defense; (2) erroneously instructing the jury it could convict him even if he believed he was touching someone else who is an adult; and (3) erroneously denying his motion for mistrial. We affirm the judgment.

I

FACTUAL BACKGROUND

Prosecution Evidence

Islasmacias and Matthew P. went to the home of Jared G. and X.G. for a barbecue and to watch a fight. Also living in the home at the time were Jared and X.G.'s two children, Jared's sister Pamela A., and her two young children, P.A. and S.A.

Jared and X.G.'s home has three bedrooms. The couple slept in one bedroom, their children slept in another, and Pamela and her two children slept in the third bedroom on an inflatable mattress. Islasmacias has known Jared for several years and is very familiar with Jared's home.

During the barbecue, Islasmacias and Matthew drank some beers. After the barbecue, X.G., Jared, Islasmacias, Matthew and Pamela went to a club where they stayed for several hours. The four children stayed home with a babysitter. At the club, X.G. had one alcoholic beverage. The others had varying amounts more. When the club closed, X.G. drove Jared, Islasmacias, and Matthew back to Jared and X.G.'s home. Pamela stayed behind with a friend. Once at Jared and X.G.'s home, Jared and Matthew had to help Islasmacias get from the car into the house. Jared told Islasmacias and

Matthew to spend the night in the living room because they were drunk and he did not want them to drive. Islasmacias asked to use the bathroom. Jared told him to go to the bathroom outside. Jared did not want him to go down the hallway where the bathroom is because he did not want him to go near the children while he was drunk.

Islasmacias called Pamela and asked her when she was coming home. She asked him why he wanted her to come home and he replied, "I don't know. Just come home." She told him she was going to stay where she was for a little while longer.

Meanwhile, X.G. took the babysitter home. When she returned, Islasmacias and Matthew appeared to be asleep. One was lying on the couch and one was lying on the loveseat. X.G. checked on the children, closed the door to their rooms, and went into her room. Just as she was falling asleep, she heard P.A. screaming.

X.G. got up quickly and ran to the door. P.A. appeared upset and scared. X.G. asked her what had happened. She said Islasmacias was kissing her cheek and trying to touch her private parts. Thinking the worst, X.G. yelled for Jared and then comforted P.A. Jared started pushing Islasmacias out of the house. Matthew grabbed Islasmacias and took him out. As they were leaving, Matthew said, "I'm sorry, [Jared]. He thought it was your sister."

X.G. called Pamela and told her she needed to come home. When she came home, X.G. and Jared told her what happened, and X.G. called the police. In the meantime, Pamela asked P.A. what happened. She told her that she was sleeping and felt a man kissing her cheek and trying to touch her private part over the covers. In a subsequent interview at the Chadwick Center for Children, P.A. demonstrated Islasmacias's conduct

by holding her hand out straight in front of her vaginal area and moving her hand up and down. At trial, P.A., who was then seven years old, testified Islasmacias kissed her all over her face and touched her vaginal area over her pajamas while she was sleeping. She said the lights were off at the time.

Pamela is 5 feet 3 inches tall. P.A. is approximately half Pamela's height. To get to P.A.'s bedroom from the living room, Islasmacias had to go through the kitchen and down a hallway.

Defense Evidence

Before going to the club, Islasmacias drank a couple of beers at Jared and X.G.'s home. At the club, Islasmacias drank cognac and coke. Some of his drinks were singles and some of his drinks were doubles. He has little memory of what happened after he returned to Jared and X.G.'s home. He does not recall calling Pamela. However, he testified he did not know the kids were in Pamela's room and the only reason he would have had for going into the room was to "hook up" with Pamela as he was interested in her.

Although he did not actually see Pamela come home, he assumed she had done so because he heard someone come through the door. Pamela's bedroom was dark when he entered it. He looked for the light switch, but could not find it. He lay down on the mattress, saw P.A.'s face, and realized Pamela was not in the room. He rolled off the mattress and then X.G. came into the room. Jared asked him to leave and he did. He does not remember kissing P.A.'s face or touching her vaginal area over her clothes. He

denies having any sexual interest in children. Jared confirmed that Islasmacias has never previously acted interested in children, but has previously acted interested in Pamela.

During cross-examination, Islasmacias admitted P.A. is very tiny – just a little bigger than a pillow on a queen-size bed. He also admitted that during an initial interview with a police detective, he denied being drunk and denied being interested in Pamela.

II

DISCUSSION

Islasmacias contends the trial court violated his federal due process and jury trial rights by failing to give the jury a mistake of fact instruction, by erroneously instructing the jury he could be convicted even if he believed he was touching a different and adult person, and by failing to grant his motion for a mistrial after giving the erroneous instruction. These contentions share the premise that mistake of fact is a defense to a violation of section 288, subdivision (a), if the mistaken fact is the child's identity and the child was mistaken for a person known to be an adult.

We previously addressed the merits of this premise under analogous factual circumstances in *People v. Tober* (1966) 241 Cal.App.2d 66 (*Tober*).² In *Tober*, the defendant, in defense to charges under section 288, subdivision (a), testified he entered a dark bedroom expecting to find an adult woman he knew. (*Tober*, at pp. 68, 72-73.) He went over to the person who was sleeping in the bed, lifted her nightgown, and put his

² Curiously, the parties did not discuss or cite *Tober* in their briefs.

finger in her vagina. The person uncovered her face, he realized she was a child, and he immediately withdrew his finger. (*Id.* at p. 68.) On appeal, the defendant raised numerous contentions almost entirely premised on the theory he could not be guilty of violating section 288, subdivision (a), if he in good faith believed the child was a different and adult person. (*Tober*, at pp. 72-73.) We rejected this premise, observing "[t]he very refusal to distinguish between a child of tender years and an adult may be said to be characteristic of some of those who engage in the sort of conduct of which defendant has been convicted." (*Id.* at p. 73.)

The California Supreme Court approved *Tober* in *People v. Olsen* (1984) 36 Cal.3d 638, 645-646. In addition, *Tober* is consistent with the purpose of section 288, which is "to provide children with 'special protection' from sexual exploitation. [Citation.] The statute recognizes that children are 'uniquely susceptible' to such abuse as a result of their dependence upon adults, smaller size, and relative naiveté. [Citation.] The statute also assumes that young victims suffer profound harm whenever they are perceived and used as objects of sexual desire. [Citation.] It seems clear that such concerns cannot be satisfied unless the kinds of sexual misconduct that result in criminal liability are greatly expanded where children are concerned." (*People v. Martinez* (1995) 11 Cal.4th 434, 443-444.)

Even if we did not have our previous decision in *Tober* to guide us, we would reject Islasmacias's premise. The mistake of fact defense is only available for factual mistakes that disprove criminal intent. (§ 26.) "The corpus delicti of [a violation of section 288, subdivision (a)] consists of (1) any lewd or lascivious act upon any part of

the body, (2) of a child under the age of fourteen years, (3) with intent of arousing, appealing to or gratifying the lust or passions or sexual desires of either the perpetrator or of such child. [Citations.]" (*People v. Nothnagel* (1960) 187 Cal.App.2d 219, 225; accord *People v. Raley* (1992) 2 Cal.4th 870, 907; CALCRIM No. 1110.) Although section 288, subdivision (a), requires the victim to be under 14 years old, it does not require the perpetrator to know or intend this to be case. The perpetrator's understanding of the victim's age does not affect the application of section 288. (*People v. Paz* (2000) 80 Cal.App.4th 293, 297.) Accordingly, even if Islasmacias mistakenly believed P.A. was Pamela, such a mistake does not disprove the requisite criminal intent and is not a defense to a violation of section 288, subdivision (a). Therefore, we conclude the trial court did not err by failing to give the jury a mistake of fact instruction, by instructing the jury Islasmacias could be convicted under section 288 even if he believed he was touching a different and adult person, or by failing to grant Islasmacias's motion for a mistrial.

Finally, although Islasmacias may not be a pedophile and faces significant collateral consequences from his conviction, we have no trouble as a policy matter concluding his conduct falls within the ambit of section 288, subdivision (a). One who, like Islasmacias, intentionally touches another person in a lewd and lascivious manner without ascertaining the person is the intended target of his touching and is receptive to his touching appropriately bears the consequences from a later revelation the person is under 14 years old. As the California Supreme Court explained, "one who commits lewd

and lascivious acts with a child, even with a good faith belief that the child is 14 years of age or older, does so at his or her peril." (*People v. Olsen, supra*, 36 Cal.3d at p. 649.)

III

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.